85-33

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

MARTHA HEWITT, Personal Representative of the Estate of Howard Hewitt, Deceased; and MARTHA HEWITT and HARRY HEWITT, on their own behalf,

Petitioners,

vs.

CITY OF TRUTH OR CONSEQUENCES; et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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55pp

QUESTION PRESENTED

Whether, in a §1983 action, the totality of the circumstances concerning the use of deadly force included the police officers' misconduct in the search and non-deadly seizure of the suspect in the course of the incident.

LIST OF ALL PARTIES

Martha Hewitt
Harry Hewitt
City of T or C
John Sawyer
Elfigo Armijo
John Sarember
Brack Callahan
Henry Cruz
Andy Garcia
Charlie Cox
Board of County Commissioners for the County of Sierra, New Mexico

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MARTHA HEWITT, Personal Representative of the Estate of Howard Hewitt, Deceased; and MARTHA HEWITT and HARRY HEWITT, on their own behalf,

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vs.

CITY OF TRUTH OR CONSEQUENCES; JOHN SAWYER, individually and as Chief of Police for the City of Truth or Consequences; ELFIGO ARMIJO, individually and as former Chief of Police for the City of Truth or Consequences; JOHN SAREMBER, individually and as a police officer for the City of Truth or Consequences; BRACK CALLAHAN, individually and as a police officer for the City of Truth or Consequences; HENRY CRUZ, individually and as a Reserve Deputy Sheriff for the County of Sierra, New Mexico; ANDY GARCIA, individually and as a Mayor of the City of Truth or Consequences; CHARLIE COX, individually and as Sheriff of Sierra County, New Mexico; and BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SIERRA, NEW MEXICO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the proceeding on April 4, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as 758 F.2d 1375 (10th Cir. 1985).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion and judgment on April 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Amendment IV: "The right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated...."

Constitution of the United States, Amendment XIV, §1: "... nor shall any state deprive any person of life, liberty, or property without due process of law..."

42 U.S.C. §1983: "Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent, police officer Callahan was called on patrol duty to a bar where a window had been broken and a burglary suspected, and he found the deceased, Howard Hewitt, very intoxicated and hiding in a tree. After getting Hewitt to the ground, Callahan discovered Hewitt was only wearing a pair of jeans and boots, and Callahan superficially frisked him then. Callahan then handcuffed Hewitt with his hands behind his back, but not through his pantloops.

Out of curiosity, an off-duty Reserve Deputy Sheriff, Respondent Cruz, went to the scene of the arrest. He was requested by Callahan to watch the suspect. Howard Hewitt was scared. At Cruz' suggestion, Callahan removed Hewitt from the police car to check his handcuffs, which Hewitt had maneuvered to his

front from behind his back. At that time, Callahan conducted a second pat-down search on Hewitt, and removed a pistol grip from Hewitt's pocket, and returned it back to him, without any further search being triggered. Callahan testified that he never reached into Hewitt's boots at all during his searches.

After Hewitt was returned to the backseat of Callahan's police car, Cruz first discovered that Hewitt had a gun (which turned out to be a non-shooting starter pistol), and was theatening suicide if the officers got any closer. Callahan testified that he used various psychological approaches on Hewitt.

Cruz testified that within the next few minutes, he watched Hewitt open the police car's secured back door by reaching under the screen cage in the backseat

and popping the door locks, with his hands still handcuffed, and with the starter pistol still in his hands.

Callahan testified that he had known all along that a suspect detained in the back of his police vehicle could escape by manipulating the door levers and locks. Callahan testified that Hewitt kicked the door open with his feet.

After Hewitt was outside the police car, he continued to threaten to kill himself. Cruz believed that Hewitt's threats were serious. Cruz, who was carrying his gun in violation of his department's regulations, did unholster his weapon when Hewitt, for one time only, lowered the starter pistol in his direction, as if aiming it directly at him. Callahan also felt that Hewitt, instead of continuing to wave the pistol around, lowered it right at him and so

pulled his gun, but never did fire his weapon either.

Cruz repeatedly and abusively threatened to kill Hewitt if Hewitt did not kill himself, taking his cues to make those threats from Callahan and Sarember. However, Callahan testified that he instructed Cruz not to talk to Hewitt.

Respondent Defendant police officer Sarember had come on the scene for a second time, but there was no real coordination or direction between the officers. At one point Callahan thought Hewitt's starter pistol might be a toy or non-functional or of limited effectiveness, but he testified that he never advised the other officers and later changed his mind when he heard the cylinder being rotated and squeaking or clicking. Cruz, who was standing in close proximity to Callahan, never heard

Hewitt cock the gun or make any noise with it.

Sarember told Hewitt to shoot himself a number of times. Despite Hewitt's threat to kill himself if Sarember turned his headlights on him, Sarember did so. And then Sarember exited his car, took a shotgun along for psychological advantage, chambered a round in his shotgun, and told Hewitt that they were not going to play games anymore.

Cruz had tried to go behind Hewitt to tackle him, but Sarember's headlights were blinding him in his position directly behind Hewitt, and he considered himself in the line of fire when Sarember chambered his shotgun and said to Hewitt that they were not playing games with him, so he ran away from his position. As soon as Cruz heard the shotgun rack,

he ran a distance of three feet and dove for another three feet, and had hit the ground within seconds just as the shotgun was fired.

Sarember testified that Hewitt made eye contact with him and took direct aim on him, despite his being on the side of his headlights. Another law enforcement officer, Bradley Bush, testified that he saw Hewitt turn towards Sarember, go into a crouching position with his hands in front of his chest, apparently pointing his hands in Sarember's direction, and Hewitt was shot almost immediately. Sarember shot Hewitt dead, feeling that he was an instrument of Hewitt's suicide. So within five minutes of his arriving again at the shooting scene, Sarember had killed Hewitt in the open field into which he was backing.

The testimony of the one police

expert witness in this case was positive and without qualification that Respondent Sarember could not reasonably believe that he had to fire in self-defense in the circumstances of the shooting.

The trial court excluded, and specifically instructed the jury to disregard, all evidence concerning the police search of the deceased, his handcuffing, the condition of the police car in which the deceased was supposed to have been secured, and the Respondents' handling of a potential suicide. It was the professional opinion of the Petitioners' police expert witness, who was allowed to testify, but whose testimony thereon was struck by the trial court, that but for the occurrence of each one of these actions which he considered improper on the part of Respondents, the final fatal act of

shooting the deceased could undoubtedly have been avoided. The trial court ruled that the Respondents' handcuffing, searching, securing and treatment of the deceased were not relevant to this civil rights action, and that therefore all testimony, including this expert witness', with respect thereto was to be disregarded.

In addition, the trial court rejected the Petitioners' tender on another expert witness at trial, a psychologist, on the grounds of relevancy, confusion of issues and misleading of the jury, given the court's opinion that any violation of proper crisis intervention techniques in a potential suicide situation by law enforcement officers could not implicate any constitutional rights cognizable in a § 1983 action. Dr. Trost would have

testified before the jury that the Respondents' use of threatening language, and the interaction between the Respondent officers themselves and between them and the deceased, exacerbated the situation which resulted in the death of Howard Hewitt, and that if Respondents had acted differently in this situation, using proper crisis intervention techniques, it is highly probable that no death would have recurred here.

Finally, the trial court ruled that any police negligence, simple or gross, would not be permitted to go to the jury here.

The United States Court of Appeals for the Tenth Circuit, in a 2-1 decision, held that any negligent police misconduct in the search and non-deadly seizure of Hewitt did not constitute an abuse of official power condemned by the

Constitution, remediable by section 1983.

The basis for federal jurisdiction was 28 U.S.C.A. §1343(1)(2)(3)(4), 28 U.S.C.A. §1291, 28 U.S.C.A. §1294, and 28 U.S.C.A. §1331(a).

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the principles enunciated in this Court's Tennessee v. Garner ruling.

This Court recently held in Tennessee v. Garner 471 U.S. ___, 85 L.Ed.2d 1, 7, 105 S. Ct. ___ (1985), that "...apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." The Court explained that it examines the reasonableness of the manner in which such a seizure is conducted by balancing the extent of the

intrusion against the need for it, determining whether "the totality of the circumstances" would justify it. Ibid., at 7-8.

In the instant case, the Court of Appeals upheld the trial court's ruling excluding evidence of the totality of the circumstances preceding the shooting itself. Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 (10th Cir. 1985). Indeed, the trial court specifically ruled during the course of the trial that: "...at the end of the case, if I feel that the only question to be presented to this jury is whether or not excessive force was used, as distinguished from a theory whereby a totality of circumstances might be considered for purposes of submitting the case to the jury on gross negligence, if excessive force is the only issue which will be

submitted, then I will entertain a motion for striking of all this testimony concerning these items that we have discussed. Handcuffing, frisk searches, and the condition of the vehicle."

The struck testimony of the police expert witness for Petitioners was that:

But for the failure, not once, but twice, of Respondent Callahan to properly search Howard Hewitt, leaving a harmless starter pistol in the deceased's possession, no such pistol could have been produced by him and provide Respondents with any excuse to kill him.

But for the failure of Respondent Callahan to properly handcuff Howard Hewitt, he could not have gotten his hands on the starter pistol or ever threatened himself or anyone else, or provide Respondents with any excuse for killing him.

Hewitt in the police car of Respondent Callahan, allegedly due to the improper condition of that car, he could not have been placed in the position of harm outside that car where he died.

But for the aggressive and abusive language and actions improperly perpetrated by Respondents officers against Howard Hewitt, an intoxicated, distraught person and potential suicide, he would not have died where, when and how he did.

And but for such law enforcement misconduct, taken singly or taken together, Howard Hewitt need not have died at Respondents' hands.

Now Monroe v. Pape, 365 U.S. 167, 187, 81 S. Ct. 473, 52 L.Ed.2d 492 (1961), unalterably stands for the proposition that 42 U.S.C. §1983 must be read against the background of tort

liability which makes a person responsible for the natural consequences of his actions. It must be asked why these Respondents should not be liable for the natural consequences of their actions in improperly searching and handcuffing the deceased, in improperly securing him in the police vehicle, and in improperly threatening and mishandling this disturbed person right up to the moment of his death, in the circumstances of this case. The egregious actions taken by Respondents against Howard Hewitt were not confined to the shooting itself. The other shocking actions surely included the inadequate search, the improper handcuffing, the ineffective securing in the police vehicle, and the Respondents' offensive handling of this potential suicide, all of which actions were part and causal of, and proximately

related to, the final act of shooting the deceased. See Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975). As was said in Roberts v. Marino, 656 F.2d 1112, 1114 (5th Cir. 1981): "A determination of whether a constitutional violation has occurred through use of unreasonable force is based on the individual facts and circumstances. Reasonableness of force must be evaluated in light of the need, the motivation, and the extent of the injury inflicted." (Emphasis added). Here, in the circumstances of this case, there simply would have been no need to kill Howard Hewitt if the Respondents had not engaged in their other misconduct leading up to the killing.

Obviously, the jury sitting on this case could not properly decide Petitioners' civil rights claims unless the totality of the circumstances

the totality of the circumstances surrounding the use of deadly force could be considered. For the trial court to isolate this matter to the final moment of Howard Hewitt's life and to the final seconds of the killing itself, and to totally disregard the evidence of all that had gone before and that had led up to the killing, was to rob the jury of its function to weigh all the relevant and probative facts in this case, and to deny Petitioners a full and fair hearing on their claims of constitutional deprivation.

In addition, the trial court excluded all or crucial parts of the testimony of two of Petitioner's expert witnesses, relevant to these events. If the trial court was incorrect on this relevancy ruling, then the trial court committed reversible error in not

permitting these expert witnesses to testify in order to assist the trier of fact to understand the evidence and to determine facts in issue. See Davis v. Freels, 583 F.2d 337 (7th Cir. 1978).

Given the admissions by the Respondents as to their bizarre actions and psychological approaches during the incident, such expert testimony was both relevant and probative to the ultimate issue as to whether deadly force had been unnecessarily, and thus excessively, used against the deceased. Again, if law enforcement officers are responsible for the natural consequences of their actions, then all of those actions of Respondents leading to the death of Howard Hewitt were at issue in this trial. The trial court certainly improperly excluded Dr. Trost's proferred

testimony regarding the psychologically inappropriate reasons for the Respondents' actions against the deceased and their counterproductive results here. See Romeo v. Youngberg, 644 F.2d 147, 162 (3rd Cir. 1980), vacated and remanded on other grounds, 457 U.S. 307, 73 L.Ed 2d 28, 43, 102 S.Ct.(1982). Far from confusing the issues or the jury, such expert testimony could not but help the jury to understand the evidence and to determine the facts in issue.

Thus, regardless of the legal theory applicable to the facts of this case, whether it be negligence, recklessness or willfulness, Petitioners contend that such evidence relating to the actions and statements completed by Respondents prior to the shooting itself was relevant to the issue of excessive force and was critical to the deliberations of the

jury, yet was improperly excluded by the trial court.

Finally, Petitioners attempted to have this case tried on a theory of negligence, as one ground for the Respondents' alleged liability under 42 U.S.C. §1983 for deprivation of the Petitioners' decedent's constitutional rights. However, the trial court refused to submit the case to the jury on any negligency theory, simple or gross. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981), clearly and conclusively held that:

> "Nothing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In Baker v. McCollan, (443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d

433 (1979), we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possiblity that such action could be brought under §1983. . . . §1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any §1983 action the initial inquiry must focus on whether the two essential elements to a §1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the

Constitution or laws of the United States."

The Court of Appeals upheld the trial court's refusal to permit evidence of Respondent officers' negligent acts to go into the evidence to be considered by the jury. Compare Hirst v. Gentzen, 676 F.2d 1252, 1263 (9th Cir. 1982). The effect of the Court of Appeals decision is to continue to deny the Petitioners' negligence claims, without benefit of trial. The lower courts essentially have telecoped the actions of Respondents to the final act of shorting Howard Hewitt, emasculating the principles enunciated in this Court's police misconduct cases.

In the final analysis, the Petitioners and the jury thus both were deprived of the chance to have justice done in this matter.

CONCLUSION

For the foregoing reaosns, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARTHA HEWITT, Personal Representative of the Estate of Howard Hewitt, Deceased; and MARTHA HEWITT and HARRY HEWITT, on their own behalf,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 82-2447
CITY OF TRUTH OR CONSEQUENCES; JOHN SAWYER, individually and as Chief of Police for the City of Truth or Consequences; ELFIGO ARMIJO, individually and as former Chief of Police for the City of Truth or Consequences; JOHN SAREMBER, individually and as a police officer for the City of Truth or Consequences; BRACK CALLAHAN, individually and as a police officer for the City of Truth or Consequences; HENRY CRUZ, individually and as a Reserve Deputy Sheriff for the County of Sierra, New Mexico; ANDY GARCIA, individually and as a Mayor of the City of Truth or Consequences; CHARLIE COX, individually and as Sheriff of Sierra County, New Mexico; and BOARD	)	

OF COUNTY COMMISSIONERS FOR)
THE COUNTY OF SIERRA, NEW)
MEXICO,)
)
Defendants-Appellees.)

Appeal from the United States District Court for the District of New Mexico
(D.C. No. CIV-81-361C)

Ray Lewis Fuller of Southern New Mexico Legal Services, Las Cruces, New Mexico (Morton S. Simon of Friedland, Simon, Lopez, Vigil & Nelson, Santa Fe, New Mexico, with him on the brief), for Plaintiffs-Appellants.

Rebecca A. Houston (Charles A. Pharris with her on the brief) of Keleher & McLeod, P.A., Albuquerque, New Mexico, for Defendants-Appellees Sarember, Callahan, City of Truth or Consequences, Sawyer, Armijo and Garica.

John P. Nivala of Cherpelis and Nivala, P.A., Albuquerque, New Mexico (J. Duke Thornton of Shaffer, Butt, Thornton & Baehr, Albuquerque, New Mexico, with him on the brief), for Defendants-Appellees, Cruz, Cox, and Sierra County Board of Commissioners.

Before BARRETT, DOYLE, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

This civil rights action was brought by Martha Hewitt as personal representative of the estate of her son Howard Hewitt, and by Martha and her husband Harry Hewitt on their own behalf.[1] Plaintiffs sought damages and injunctive relief pursuant to 42 U.S.C. § 1983 (1982) against the City of Truth or Consequences, the Sierra County New Mexico Board of County Commissioners, various City and County supervisory officials, City police officers John Sarember and Brack Callahan, and Sierra County Reserve Deputy Sheriff Henry Cruz. Plaintiff

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[1] Mr. and Mrs. argue on appeal that the court erred in failing to recognize the claim brought on their own behalf. Although the trial court did not give the proposed instruction on this claim, plaintiffs made no objection below. Consequently, the Hewitts may not raise this issue as error on appeal. See Fed. R. Civ. P. 51. Our references to plaintiff in this opinion refer only to Martha Hewitt in her representative capacity.

alleged that Howard Hewitt's death during events following his arrest deprived Hewitt of his Fourth, Fifth, Eighth,[2] and Fourteenth Amendment rights.

The issues for trial were bifurcated, and the only matter to be determined in the first phase was whether defendants Sarember, Callahan, and/or Cruz, who had been involved personally in the events surrounding Hewitt's death, had used excessive force. The jury found in favor of all three defendants by returning special verdicts in response to

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[2] The district court correctly ruled that the use of excessive force on a pretrial detainee does not violate the Eighth Amendment's prohobition of cruel and unusual punishment. The Eighth Amendment does not apply until after an adjudication of guilt. See Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979); Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977). On appeal, plaintiff pursues only her claim grounded on the Due Process clause of the Fourteenth Amendment.

interrogatories. On appeal, plaintiff's primary contention is that the district court erred by ruling that police negligence could not be the basis for a separate claim under section 1983. Plaintiff argues that the court therefore erroneously refused to allow the admission of evidence or to instruct on alleged negligence. Plaintiff also asserts error regarding other evidentiary rulings and with respect to the jury instructions given. For the reasons set out below, we affirm.

I.

The tragic facts generating this suit, viewed most favorably to the jury verdict, see Rodgers v. Hyatt, 697 F.2d 899, 905 (10th Cir. 1983), are as follows.

While on early morning patrol duty, Callahan received a report that the

window of a bar had been broken and that a burglary was suspected. Upon arriving at the bar, Callahan discovered Hewitt in a tree, intoxicated and wearing only a pair of jeans and boots. Callahan arrested Hewitt, searched him, handcuffed his hands behind his back, and placed him in the back of his police car. A metal grid separated the front and back seats of the car, and the inside door handles had been removed.

Sarember, who was not on duty, was dispatched from his home to the bar to back up Callahan. Hewitt was already handcuffed and in the police car when Sarember arrived. After searching the bar, Sarember went to the police station to pick up a fingerprint kit and a camera.

Cruz, who was also off-duty, heard about the activity at the bar over the

police radio and went there on his own initiative. Callahan asked Cruz to watch Hewitt, who was then in the police car, while Callahan searched the bar and arranged to have Hewitt's car towed. Cruz informed Callahan that Hewitt had managed to work his hands around in front of him. Callahan took Hewitt out of the car and frisked him again, this time finding a pistol grip in his front pocket. Callahan put the grip back in the pocket and adjusted Hewitt's handcuffs, although he did not recuff Hewitt with his hands behind his back. Callahan than put Hewitt back in the police car and locked the doors. Callahan testified at trial that he knew it was possible for someone in the back seat of the car to get out of the locked vehicle by reaching through a gap in the metal grid and manipulating the lock mechanism.

Callahan went back to the tow truck operator and was subsequently informed by Cruz that Hewitt had a gun. Callahan returned to the police car and saw Hewitt with a gun to his mouth. Hewitt threatened to shoot himself if Callahan did not let him go. Callahan tried unsuccessfully to reason with Hewitt, who managed to open the door and get out of the car.

Hewitt continued to threaten suicide and began to back across a street and toward an open field covered with scrub brush. Callahan drew his own gun and told Hewitt to drop his. Hewitt refused, and continued to back up while Callahan continued to advance. As Hewitt backed across the field, pointing the gun at himself and waving it around, Sarember returned. Sarember testified that Hewitt shouted he was going to kill himself and

that he, Sarember, had responded "go ahead". Rec., vol. VII, at 564. Sarember went back to his car, positioned it so that the headlights were shining on Hewitt, got out of the car with a shotgun, and chambered a round of ammunition.

Sarember called to Hewitt that they were through playing games, or words to that effect, pointed the shotgun at him, and told him to drop the gun. Sarember testified that Hewitt then turned toward him in a crouching position, dropped the gun into a shooting posture, and aimed it at Sarember. Sarember fired the shotgun, killing Hewitt. The gun in Hewitt's possession, which had been hidden in this boot, was subsequently determined to be a nonshooting starter pistol.

II.

Plaintiff alleged at trial that

Callahan, Cruz, and Sarember had unconstitutionally deprived Hewitt of his life without due process by their use of excessive force. The jury decided this claim in favor of defendants, finding by special verdicts that a person in Sarember's position could reasonably believe that Hewitt's starter pistol was a functional weapon, that Sarember himself believed the weapon was functional, and that Hewitt suddently pointed the pistol at Sarember as if preparing to shoot Sarember immediately before Sarember shot him. Plaintiff does not argue on appeal that these findings are unsupported by the evidence.

Plaintiff also alleged below that Callahan, Cruz and Sarember had negligently searched, handcuffed, and secured Hewitt in the police car, and had negligently or improperly handled Hewitt

as a potential suicide. Plaintiff contended that this negligence proximately caused the use of deadly force and thus stated a separate claim for relief under section 1983. The trial court ruled that there was no evidence of gross negligence or wantonness, and that ordinary negligence cannot be the basis for recovery under section 1983 and the Fourteenth Amendment. Accordingly, the judge did not allow the jury to consider any evidence of the alleged negligent acts.[3] On appeal, plaintiff relies on Parratt v. Taylor, 451 U.S. 527 (1981), to support her contention that negligent

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[3] The court alternatively ruled that if defendants were negligent in searching, handcuffing, and securing Hewitt, and in dealing with his suicide threats, these acts were not the proximate cause of Hewitt's death as a matter of law. In view of our resolution of the negligence claim, we need not address the propriety of this ruling.

acts provide a basis for section 1983 liability.

In McKay v. Hammock, 730 F.2d 1376 (10th Cir. 1984) (en banc), this court recognized that "a plaintiff need not necessarily address a defendant's state of mind to successfully articulate a section 1983 cause of action . . . ." Id. at 1373. We pointed out that neither the statutory language nor the relevant Supreme Court decisions impose any intent requirement on a section 1983 claim, and that "the relevant inquiry should focus on what state of mind, if any, is imposed by the particular constitutional provision at issue." Id. Accordingly, negligent conduct may under appropriate circumstances give rise to a coinstitutional deprivation remediable under section 1983.

Plaintiff does not articulate the

constitutional provision she believes is violated by the negligent acts alleged here. However, the Due Process Clause protects individuals from the abuse of official power and therefore imposes substantive limitations on state activities. Due process affords not only a procedural guarantee against deprivation of life, liberty, and property, but likewise protects substantive aspects of those interests. See, e.g., Kelley v. Johnson, 425 U.S. 238, 244 (1976); Baer v. City of Wauwatosa, 716 F.2d 1117, 1123 (7th Cir. 1983); Wilwording v. Swenson, 502 F.2d 844, 851 (8th Cir. 1974), cert. denied, 420 U.S. 912 (1975). "[T]he right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." Youngblood v. Romeo, 457 U.S. 307, 315 (1982).

Police conduct in thus limited by substantive as well as procedural restrictions. See, e.g., Rochin v. California, 342 U.S. 165 (1952). In Rochin due process was offended when evidence was admitted at trial that had been obtained by police conduct which "shocks the conscience." Id. at 172. In condemning this result, the Court pointed out that the Due Process Clause is "the least specific and most comprehensive protection of liberties," and that defining its vague contours must necessarily involve an evaluation of the circumstances in the particular case. Id. at 170-72.

In considering when negligent conduct may constitute a substantive denial of due process, we are guided by the analysis applied in cases involving alleged use of excessive force. Not all

force used by police rises to a constitutional violation. See Wise v. Bravo, 666 F.2d 1328, 1333-35 (10th Cir. 1981); Miller v. Smith, 656 F.2d 337, 339-40 (8th Cir. 1981); cf. Sampley v. Ruettgers, 704 F.2d 491, 494 (10th Cir. 1983) (use of force by prison guards). But the use of excessive force on a pretrial detainee deprives the victim of life or liberty without due process in violation of the Fourteenth Amendment. Black v. Stephens, 662 F.2d 181, 188 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982); Herrera v. Valentine, 653 F.2d 1220, 1229 (8th Cir. 1981). Factors relevant to whether the use of force is excessive are the relationship between the amount of force used and the need presented, the extent of the injury inflicted, and the motives of the state officer. See Wise, 666 F.2d at 1333.

Force inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness, may be redressed under section 1983. Id. at 1333-34; see Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981).

We need not decide how egregious police conduct must be to rise to a substantive denial of due process. See generally Lessman v. McCormick, 591 F.2d 605, 609-11 (10th Cir. 1979) (discussing cases). Wherever that line may be drawn, the conduct complained of here simply is not an abuse of power condemned by the Constitution. Hewitt was a suspected felon who resisted arrest. The police were justified in searching him, handcuffing him, and securing him in a police car. Their negligence, if any, in preforming these acts does not offend the

principles of decency and justice embodied in the Due Process Clause. Plaintiff's claim based on the alleged negligence thus failed to state a constitutional deprivation remediable by section 1983. Accordingly, we find no grounds for reversal in the trial judge's refusal to submit the negligence claim to the jury, or in his failure to allow evidence to be introduced on that claim.

The opinion in Parratt is consistent with the principle that abuse of state power is the standard by which a denial of due process is measured. In considering the sufficiency of procedural due process, the Court in Parratt held that a prisoner whose hobby kit was negligently lost did not establish a Fourteenth Amendment violation because the state tort law provided him an

adequate process for remedying the loss.[4] If the state had failed to provide meaningful procedures for compensating the prisoner, an abuse of power would have existed remediable under section 1983. See 451 U.S. at 537. The Court made clear in Parratt that absent such abuse, negligent conduct by the state does not violate the Constitution:

> "Our decision today is fully consistent with our prior cases. To

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[4] The Court in Parratt cautioned that "[t]he fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'" 451 U.S. at 540 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). As we recently recognized in Lusby v. T.G.&Y. Stores, Inc., 749 F.2d 1423, 1434 (10th Cir. 1984), where a deprivation of life or liberty is involved, no postdeprivation state remedy in the form of damages can ever provide a meaningful hearng to the victim so as to satisfy procedural due process. See also Parratt, 451 U.S. at 545 (Blackmun, J., concurring); Hudson v. Palmer, 104 S. Ct. 3194, 3208 n.4 (1984) (Stevens, J., concurring).

> accept respo ient's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society."

451 U.S. at 544.

In sum, the alleged negligent conduct in the present case fails to rise to a denial of due process not because state postdeprivation procedures are adequate, but because the negligence asserted does not constitute an abuse of official power.

We now turn to plaintiff's remaining allegations of error. Plaintiff offered evidence at trial of actions and statements made by Sarember subsequent to the shooting which she claims were probative of Sarember's intent and state of mind when he shot Hewitt. This evidence, which was disputed by Sarember, included testimony that Sarember had requested a photograph of the deceased for his scrapbook, had asked to take his own pictures of Hewitt at the mortuary, and had requested the shotgun shell that killed Hewitt for a souvenir. The district court denied admission of the evidence pursuant to Fed. R. Evid. 403, ruling that the probative value of this evidence, if any, was outweighed by its prejudicial effect.

"A trial court has broad discretion in applying Rule 403." United States v.

Mangiameli, 668 F.2d 1172, 1176 (10th Cir.), cert. denied, 456 U.S. 918 (1982); see In re Beverly Hills Fire Litigation, 695 F.2d 207, 218 (6th Cir. 1982), cert. denied sub non. Bryant Electric Co. v. Kiser, 461 U.S. 9 (1983). The court "may exclude otherwise admissible evidence after balancing its probative value against certain competing considerations set forth in the rule and concluding that the costs of the evidence outweigh its benefits." Mangiameli, 668 F.2d at 1176. In this case, the court stated his doubt that the proffered evidence was relevant to the issue of excessive force, and that even if it were "the prejudical effect of this testimony would far outweigh any probative value in the case." Rec., vol. V., at 41. We find no abuse of discretion.

Plaintiff also contends on appeal

that the trial court failed to instruct the jury adequately on the issue of excessive force.[5] In assessing this argument, we must review the instructions as a whole to determine whether they adequately guided the jury under the applicable law. See Irving v. Dubuque Packing Co., 689 F.2d 170, 173-74 (10th Cir. 1982). In this case the instructions given, together with the special interrogatories, were sufficient.

The judgment is affirmed.

---

[5] We note that the trial court did not frame its instructions on this issue in terms of the standards set out in Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981). See part II supra. Although the Wise formulation is preferable, plaintiff did not request such an instruction and, in view of the instructions given, no plain error is present.

RE: No. 82-2447, Hewitt v. City of Truth or Consequences

DOYLE, Circuit Judge, Dissenting

I regret that I am unable to agree with the majority decision and that I must dissent. I offer a brief explanation as to why I have come to this conclusion.

The majority correctly ruled the trial judge erred in deciding that ordinary negligence can never support the § 1983 suit. However, there was no necessity for the jury to have decide that question because, as I view it, the conduct of the three officers added up to a possible conclusion that there was gross negligence and wanton conduct on the part of at least one of the three police officers. In particular I refer to actions of the policeman who fired the shotgun at the victim and killed him.

I am not saying that the conduct of the officers amounted to wilful and wanton conduct on their part. I am saying that there was conduct from which a fact finder could draw such a conclusion. It is, of course, sufficient if the facts would support such a decision. The three officers had control of this man once and they failed to handcuff him and properly search him. If they had been more careful, then they could have avoided the tragedy. Also the policeman who fired the shotgun told the deceased just prior thereto that when the deceased demanded to be released and threatened to kill himself, he was told to go right ahead and kill himself. One officer told Hewitt to go ahead and kill himself. There was some evidence indicating that another of the officers

threatened to kill Hewitt if Hewitt did not kill himself.

Based on these facts, the issues ought to have been submitted to the jury.

CERTIFICATE

I, Daniel A. Gonzales, an attorney for Petitioners and a member of the Bar of the United States Supreme Court, do hereby certify that on this 3rd day of July, 1985, I served three copies of the foregoing Petition, by mail, postage prepaid to the attorneys of record herein:

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CLERK

(2)

No. 85-33

In The
Supreme Court of the United States
October Term, 1985

MARTHA HEWITT, et al.,
Petitioners,

vs.

CITY OF TRUTH OR CONSEQUENCES, et al.,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the trial court's exclusion of evidence of allegedly negligent police actions in searching, handcuffing, securing and handling suspect, who escaped and was subsequently killed by an officer in self-defense, was contrary to the recent decision in *Tennessee v. Garner*.

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STATEMENT OF THE CASE

This civil rights action arose out of the shooting death of Howard Hewitt, a suspected burglar who escaped from the custody of a Truth or Consequences, New Mexico police officer, Respondent Brack Callahan, by producing and then threatening to shoot himself with what appeared to be a pistol, and who subsequently was killed by Respondent John Sarember in self-defense.

The evidence at trial concerning the manner in which Hewitt was searched, handcuffed and secured in the police vehicle prior to his escape as well as the officers' verbal exchanges with Hewitt was accurately described in the opinion below from the Court of Appeals for the Tenth Circuit and will not be reiterated here. 758 F.2d 1375, 1377-78; Petition for Writ of Certiorari, Appendix, pp. 30-34. Petitioners' version of this evidence is presented in a fashion that is biased toward their position in this appeal.

After exiting from the police vehicle, in which he had been placed by Callahan, Hewitt backed across a parking lot, a city street and a portion of an undeveloped field containing scattered brushy trees. He was followed by Respondent Callahan and Respondent Henry Cruz, an off-duty reserve deputy sheriff. Both drew their handguns during the course of the pursuit when Hewitt lowered the weapon from under his chin to point it in their direction, then again pointed the pistol barrel to his chin.

Respondent Sarember, also a Truth or Consequences police officer, had assisted Callahan in investigating the suspected burglary, but had temporarily left the scene.

He returned to find the suspect backing across the street and into the field, pursued by Callahan and Cruz.

Sarember was concerned about Hewitt escaping in the field and possibly posing a threat to surrounding residents. He parked his vehicle adjacent to the field, headlights illuminating the suspect. Sarember exited the vehicle taking with him a shotgun, chambered a round and told Hewitt that the officers were through playing games. He pointed the shotgun at Hewitt and told him to drop the gun.

Hewitt turned directly toward Sarember in a semi-crouching position and aimed the pistol at him. Sarember testified that Hewitt looked directly at him as he aimed. Sarember fired, killing Hewitt. After Hewitt's death, the pistol he carried was found to have been a starter pistol.

At trial, Petitioners called as a police procedures expert Robert DiGrazia, who took issue with several aspects of the officers' search, handcuffing and securing of Hewitt, as well as their handling of him after he escaped from the vehicle. DiGrazia testified that the procedures used were "all basically correct, but as far as the thoroughness and the manner of doing it . . . improper."

DiGrazia's primary criticisms were that the pat-down searches of Hewitt must have been deficient, simply because the pistol was not found (it was theorized that the pistol was in Hewitt's boot); that Hewitt should have been handcuffed not only behind his back but also through the beltloops on his trousers so that he could not as easily maneuver his arms in front of his body; that the vehicle was either not properly altered to prevent escape, or the

door was not properly secured; and that the officers did not handle Hewitt properly as a potential suicide.

DiGrazia additionally testified that Sarember should not have left the cover of his vehicle, should not have carried the shotgun when he exited the car, as it would "distress" a potential suicide, and should not have fired at Hewitt even after he pointed the gun at Sarember. DiGrazia emphasized the fact that Sarember's headlights were pointed toward Hewitt, and theorized that Hewitt could not have seen Sarember, although Sarember was standing under a street light. He testified that Sarember should have ducked or moved to see whether Hewitt could really see him or was blinded by the lights, and if Hewitt tracked his movements with the gun or fired, then Sarember would have been justified in using deadly force.

Petitioners also tendered as an expert Dr. James Trost, a psychologist, who tesified out of the presence of the jury that the respondent officers failed to use crisis intervention techniques appropriate for someone threatening to commit suicide. Trost admitted, however, that Hewitt was probably aware that he could not have committed suicide with the starter pistol. The trial court refused to allow presentation of Trost's testimony to the jury on the grounds of relevancy, and on the basis that any relevancy the testimony might have had was outweighed by the potential confusion to the jury which would be created by injecting the issue of suicide prevention into the trial.

Following the close of all of the evidence, the trial court excluded and instructed the jury to disregard all evidence concerning the manner in which Hewitt was

searched and handcuffed, and all evidence concerning the condition of the police car in which he was placed after being apprehended. The Court's stated basis for this ruling was that these elements did not establish a prima facie case for recovery under 42 U.S.C. § 1983. The court ruled that negligence may have been demonstrated as to these aspects of the evidence, but that gross negligence or wantonness was required under the Fourteenth Amendment and 42 U.S.C. § 1983. Alternatively, the court ruled that any negligence in searching, handcuffing and securing Hewitt was not the proximate cause of his death, as a matter of law.

The court further instructed the jury that testimony concerning what one or more of the defendants may have told Hewitt during the incident should be considered only for the limited purpose of determining whether excessive force was used, and that the issue of whether the defendants used proper procedures for the management of a potential suicide was not before them.

The trial court submitted six special verdicts to the jury, posing specific questions regarding the use of force by defendants, all of which were answered unanimously and in a manner favorable to defendants. The verdicts were as follows:

Special Verdict #1

We, the jury, find that Defendant, Henry Cruz, *did not* use excessive force in the circumstances surrounding the incident wherein Howard Hewitt died on May 22, 1980.

Special Verdict #2

We, the jury, find that Defendant, Brack Callahan, *did not* use excessive force in the circumstances surrounding the incident wherein Howard Hewitt died on May 22, 1980.

Special Verdict #3

We, the jury, find that Defendant, John Sarember, *did not* use excessive force in the circumstances surrounding the incident wherein Howard Hewitt died on May 22, 1980.

Special Verdict #4

We, the jury, find that person [sic] in the position of Defendant, John Sarember, on May 22, 1980, *could* reasonably believe that Plaintiff's Exhibit 8B, the starter's pistol held by Howard Hewitt was a functional weapon which Howard Hewitt could use to seriously injure or kill him, Saremberr.

Special Verdict #5

We, the jury, find that Defendant, John Sarember, on May 22, 1980, when he shot Howard Hewitt, *did* believe that Plaintiff's Exhibit 8B, the starter's pistol held by Howard Hewitt, was a functional weapon which Howard Hewitt could use to seriously injure or kill him, Sarember.

Special Verdict #6

We, the jury, find that Howard Hewitt, immediately before he was shot by Sarember, *did* suddenly point Plaintiff's Exhibit 8B, the starter's pistol at Sarember as if preparing to shoot at Sarember.

Petitioners appealed from the Judgment in favor of Respondents in part on the grounds that the allegedly negligent search, handcuffing, securing and handling of Hewitt proximately caused the use of deadly force, and stated a separate claim for relief under the Fourteenth Amendment and 42 U.S.C. § 1983. The Court of Appeals for the Tenth Circuit, while holding that negligence may, in some circumstances, suffice to state a claim under the Civil Rights Act, found that the specific acts and omissions complained of did not "offend the principles of decency and justice embodied in the Due Process Clause." The Court therefore found no grounds for reversal in the trial court's refusal to submit the negligence claims to the jury or to allow evidence regarding those claims to be considered.

SUMMARY OF ARGUMENT

Petitioners' claim that the trial court's exclusion of the evidence relating to the search, handcuffing, securing and handling of Hewitt was contrary to the recent decision of *Tennessee v. Garner*, 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1 (1985). They argue that the "totality of the circumstances" which *Garner* dictates should be examined, necessarily required inclusion of this evidence.

Respondents assert that the facts presented in *Garner* are easily distinguishable from the instant situation, in which Petitioners' decedent was killed in self-defense. Further, the *Garner* case dealt with the competing interests to be balanced in determining whether a seizure was

reasonable under the Fourth Amendment, and did not address the admissibility of evidence, which is the controlling question on this appeal. Finally, as the Petitioners did not advise the trial court of their contention made herein, and raised only the issue of a Fourteenth Amendment deprivation to the Court of Appeals for the Tenth Circuit, this Court should not accept jurisdiction to review these issues for the first time.

ARGUMENT

Neither the facts nor the rule of law at issue here brings this action within the ambit of this Court's decision in Tennessee v. Garner.

Petitioners seek to invoke this Court's jurisdiction by claiming that the exclusion of certain evidence by the trial court, subsequently upheld by the Court of Appeals for the Tenth Circuit, was contrary to the decision of this Court in *Tennessee v. Garner,* 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1 (1985). A close reading of the *Garner* decision does not bear out Petitioners' contention, and therefore certiorari should not be granted in this action.

This case includes one element of superficial similarity to the facts underlying *Garner,* in that Petitioners' decedent was a suspected burglar who was shot while attempting to escape from a police officer. However, the pivotal facts of this case remove it from the ambit of *Garner.* Here the jury found that the officer shot Hewitt in self-defense, in the reasonable belief that he was about to be fired upon by Hewitt. In *Garner,* the police officer

had been exonerated based upon a Tennessee statute allowing the use of deadly force to stop a fleeing non-dangerous suspected felon. There was no contention, as there was here, that the officer was in reasonable fear of losing his life or suffering serious injury.

More importantly, however, the decision in *Garner* did not address the legal issue here—whether the Tenth Circuit correctly upheld the trial court's exclusion of the evidence concerning the search, handcuffing, securing and handling of Hewitt prior to and during his escape from custody. The *Garner* decision dealt with an alleged Fourth Amendment "seizure" through the use of deadly force. The precise issue posed was whether the Tennessee statute imposed a constitutionally unreasonable seizure when applied to allow the use of deadly force to apprehend a non-dangerous fleeing suspected felon.

Petitioners single out a single phrase — "totality of the circumstances" — from the *Garner* decision and twist it out of context to argue that the evidence excluded in this case should have been presented to the jury to determine if Hewitt's shooting constituted an "unreasonable seizure" under the Fourth Amendment. This interpretation of *Garner* is inappropriate.

The context in which the phrase "totality of the circumstances" is used in the *Garner* decision makes it clear that the phrase refers to the balancing process used to determine whether a particular seizure is constitutional. *Id.*, 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 8 (1985). The "circumstances" which are evaluated are the "nature and quality of the intrusion," which is weighed against the "importance of the governmental interests alleged to justify the intrusion." *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983).

Presumably, Petitioners contend that evidence regarding the search and other procedures surrounding Hewitt's initial detainment should have been considered as part of the "nature and quality of the intrusion." However, it is difficult to see how admission of the excluded evidence would have enhanced the severity of the intrusion complained of here.[1] Hewitt's death was, in a sense, the ultimate "seizure." As this Court pointed out in *Garner,* "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Tennessee v. Garner, supra,* 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 8 (1985).

Unlike *Garner,* however, where the only counterbalance to the suspect's fundamental interest in his own life was the governmental interest in effective law enforcement, the opposing interests here were considerably more substantial. Not only the interest in effective law enforcement, but also the interests of the officers in their own lives and personal safety, as well as the lives and personal safety of nearby residents were reasonably considered to be in the balance in the context in which Hewitt was killed.

This Court predicted the result of the balancing process here in the *Garner* decision when it held that "(w)here the officer has probable cause to believe that

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[1] Indeed in urging the admissibility of this evidence, Petitioners anomalously must argue that the search and seizure of Hewitt's person should have been *more* rather than less intrusive. The excluded expert testimony was to the effect that the searches of Hewitt's person should have been more thorough, the handcuffing more restrictive, etc. Petitioners do not cite, and Respondents have not identified, any authority which implies the existence of a Fourth Amendment right to a more intrusive search and seizure than was performed.

the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* 471 U. S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 10 (1985). The jury's special verdicts firmly established the probable cause for Respondent Sarember's belief that he was compelled to fire upon Hewitt in self-defense. Admitting the evidence concerning the handling of Hewitt prior to his escape would not have altered the result of the balancing process sanctioned in *Garner.* Accordingly, any error in excluding this evidence was harmless, and review of this case should be denied.

Furthermore, *Garner* and its predecessor cases, while identifying the interests to be balanced in determining the validity of a search or seizure do not address the evidence admissible to establish those interests. Evidentiary decisions such as relevancy and the admissibility of expert testimony should be left to the broad discretion of the trial court, subject to review for abuse of that discretion. *Salem v. United States Lines Co.,* 370 U.S. 31, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962); *United States v. Ashley,* 555 F.2d 462 (5th Cir.), *cert. denied,* 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed.2d 147 (1977).

This deferral on appeal to the discretion of the trial court is based upon that court's unique advantage in being able to weigh "the intonation and demeanor of the witnesses . . ." and to "determine the emotional reaction of the jury to other pieces of evidence . . ." *United States v. Robinson,* 560 F.2d 507, 514-15 (2d Cir. 1977).

Here the trial court had the opportunity to hear and weigh the testimony of all of the witnesses, both expert and lay, as to the search, handcuffing, securing and han-

dling of Hewitt. The decision to exclude the testimony was made at the close of all of the evidence in the case. At that point, the trial court made the determination that the above evidence did not, standing alone, establish a constitutional deprivation, and that it was not relevant to the claim of excessive force that would be submitted to the jury.

The trial court's ruling was upheld by the Court of Appeals for the Tenth Circuit. This Court should decline to exercise its jurisdiction to review such an evidentiary issue, where decisions of this Court are not controlling and abuse of discretion does not appear evident from the ruling.

Finally, it should be pointed out that the issue raised by Petitioners before the Tenth Circuit was not an alleged Fourth Amendment unreasonable seizure, but rather an alleged deprivation of Hewitt's liberty interest without the due process guaranteed by the Fourteenth Amendment. As the Tenth Circuit noted in the course of its opinion, the Petitioners' Complaint originally claimed deprivations of Hewitt's Fourth, Fifth, Eighth, and Fourteenth Amendment rights arising out of his death, but only the Fourteenth Amendment claim was pursued on appeal. 758 F.2d 1375, 1377; Petition for Certiorari, Appendix, p.29.

The balancing process employed in the *Garner* case to analyze the Fourth Amendment claim is hardly a new one for this Court. *See* cases cited *Id.*, at 471 U.S. —, 105 S.Ct. 1964, 85 L.Ed.2d 1, 7-8 (1985). Yet Petitioners never raised this argument before the trial court or the Court of Appeals. As Petitioners failed to pursue a Fourth Amendment claim in the Courts below, this Court

should decline to accept review. *Youakim v. Miller,* 425 U.S. 231, 47 L.Ed.2d 701, 96 S.Ct. 1399 (1976).

CONCLUSION

Based upon the foregoing arguments and authorities, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

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